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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 329

PHILIP OSCAR SCHWANER,

Petitioner,

vs.

JOHN C. O'DONNELL, JR.,
Trustee in Bankruptcy,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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PETITION FOR WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit.

To The Honorable, the Chief Justice of the United States and the Associate Judges of the Supreme Court of the United States:

Philip Oscar Schwaner, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on April 19, 1966 affirming the judgment of the United States District Court for the Northern District of Ohio, and the Referee in bankruptcy.

OPINION BELOW.

There was no opinion in the Court of Appeals, its order is printed in the Appendix, *infra*, page 10, and is unreported at the present time, other opinions are contained in the record.

JURISDICTION.

The jurisdiction of this Court is invoked under the Bankruptcy Act, and under the Constitution and 28 U. S. C. A. Section 1254, and 11 U. S. C. A. Section 47C. The judgment of the appeals Court was entered April 19, 1966.

QUESTIONS PRESENTED.

1. Can the referee in bankruptcy charge and allow referee fees, trustees fees and attorney fees for the trustee, upon and from funds which were not a part of the bankrupt estate?

2. Did the referee deprive the bankrupt of his property without due process of law, by taking the property of the bankrupt and bestowing it upon himself and other persons, in excess and beyond any judicial power granted to the Bankruptcy Court by Article III of the Constitution of the United States?

ARTICLES AND AMENDMENTS INVOLVED.

The pertinent provisions of the First and Third Articles and the Fifth Amendments are printed in the Appendix, *infra*, at page 10.

STATEMENT OF THE CASE.

On January 19, 1962 petitioner filed his voluntary petition in bankruptcy.

The bankrupt was solvent, as the real estate was mortgaged and well secured and his ex-wife was liable for this debt also, this is not reflected in the summary which shows maximum liabilities and only the resources of the bankrupt.

He owned real property with his ex-wife who had filed a partition action in the Common Pleas Court of Richland County, Ohio. The trustee was ordered to intervene in the partition proceedings and take such steps as are necessary to demand, receive and account for any share ultimately found to be the portion or share thereof due the bankrupt in said partition proceedings.

The real estate involved was sold at partition. After paying the liens on the premises amounting to $14,544.48, fees of plaintiff's attorney, the costs, and all the taxes, there was paid to the trustee as the bankrupt's share according to the terms of the separation agreement the sum of $4,192.77 for the real estate owned jointly, and $11,729.95 from the proceeds of the land owned severally.

Though some of the services rendered by the attorney for the trustee were not truly of a professional nature, the outstanding feature of this cause is that by his entering into the competitive bidding at the sheriff's sales, the whole of Lot No. 731 in Ontario, brought $1,000 more than the appraisal and $16,000 more than the opening bid, and the other tract brought $1,500 more than the appraisal and $4,000 more than the opening bid. The bankrupt's former wife was the only other bidder on Lot No. 731, while other parties bid on the other tract.

The total amount of the claims filed and approved was $5,682.48.

The amount turned over to the trustee by the state court was $15,922.72.

The referee computed the administrative charges upon the entire receipts and not upon the amount of the proven debts. The referee orders the administrative charges to be paid out of the surplus funds of the bankrupt and not out of the debts.

No action was taken whereby the bankrupt was given any process or made an adversary party to recover any assets of the estate whereby any judgment could be rendered against him, nor by which he could inquire into or contest the acts and conduct of the referee (see entire record).

At the final meeting of creditors the attorney for the bankrupt orally objected and called the referee's attention to the matter of computation of administrative charges and upon being served with a copy of the referee's order the bankrupt filed his petition to review the order.

This petition for review was denied by the District Court and is now in this Court for review and affirmed by the Court of Appeals, for the Sixth Circuit.

REASONS FOR GRANTING THE WRIT.

This petition brings before this Court fundamental questions underlying the jurisdiction of the "Bankruptcy Court," and which we find no prior decisions of this Court; that there must be some limitation upon Congress to enact laws on the "subject of bankruptcies" is evident inasmuch as Congress has in this matter honored the limitation of the grant of power as contained in the Constitution, but which has not been honored as we view it by our lower Courts.

This Court has followed and approved the definition of Judge Blatchford, that "The subject of bankruptcies is nothing less than" the subject of the relations between an insolvent or non-paying or fraudulent debtor and his creditor, extending to his and their relief," *Wright vs. Union Central Life Insurance Company,* 304 U. S. 514, 82 L. Ed. 1499.

This places the line of demarcation of the power of Congress, and the jurisdiction of the Bankruptcy Court at the extent to where there are existing provable debts against the bankrupt to be exhausted in the Bankruptcy Court.

The scope of the jurisdiction of the Bankruptcy Act and the Bankruptcy Court is contained within the limits of one word, that is "debt." To invoke the jurisdiction of the Bankruptcy Court there must be a debt provable as such. *In re Fox West Coast Theatres,* 25 F. S. 250, 259; *In Re Philips* (Ohio), 298 Fed. 135; *Collier* 14th Ed., Section 4.03, page 583.

Congress has provided that a solvent person who owes debts may have the benefits of the Bankruptcy Act by voluntary petition therefor; *In Re Yarborough,* 18 F. S. 359; *In Re Harriman,* 31 F. S. 50; *Porterfield vs. Gerstel,* 222 Fed. 2nd 137. There is no inference of insolvency

when the bankrupt files voluntarily. *Peoples National Bank vs. Foltz*, 25 Fed. 2nd (6th) 295.

It is reasonable to assume that when Congress enlarged the Bankruptcy Act to benefit solvent debtors it was aware that there would be cases where surpluses, sometimes large ones, would be involved, yet it did not and has not enacted any statutory due process of law, whereby such surpluses would be administered, confiscated, taken, or used by the Court for any purpose.

The bankrupt must be dealt with according to law, there are no equities in the person of the bankrupt only the property of the bankrupt up to the amount of his debt is administrable in bankruptcy.

This involves no questions of equity, morals, of right or of wrong, our people have decided these questions with finality when they created their Constitution. They granted this much power to Congress and no more, Congress appears to have scrupulously stayed within the power as granted it, they have enacted no statutes to deal with the surplus in any way or for any purpose.

Our first problem is whether or not the Referee can enlarge the jurisdiction of the Bankruptcy Court beyond the debtor-creditor relationship and compel the bankrupt to pay the administration charges out of the surplus funds which are the property of the bankrupt, or use the surplus fund as the basis of computing the charges.

The gross receipts were $17,066.47, the debts $5,582.48, the surplus fund which is the property of the bankrupt $11,373.99. By basing the charges upon the bankrupt's surplus, over which the court has no jurisdiction, the charges have been increased approximately 300%. If these charges must be borne by the creditors it is very oppressive upon them and if the surplus estate were large enough it could destroy the entire value of

their claims. The charge of a $3500.00 attorney fee in this case plus the trustee's charges of $506.33 and the Referee's salary and expense fund of $439.16 amounts to $4445.49 if paid from the amount of the debts $5,682.48, for the actual dividends to creditors would leave only the amount of $1236.99 or approximately 22% of their claims.

The bankrupt is a stranger to the administration of the estate; he is not a creditor or party thereto, and the "Act" makes no provision for him to contest or protest in any way the conduct of the court, no such process is afforded him. When the limitation of the court's jurisdiction is observed he needs none, and the 5th Amendment protects him. The scope of the term "Bankruptcy" cannot be extended beyond a debtor-creditor relationship. *In re Utilities Power and Light Corp.*, 29 F. S. 763, 768.

The status of the bankrupt in the proceedings appears to be only that of a witness. The bankrupt to whom the balance of the estate is returned or surrendered is not a "creditor" and the "Bankruptcy Court" did not have jurisdiction to assert control over the funds coming from the state court partitions action, for more than would, with the funds on hand equal the amount of proven debts.

The Bankruptcy Act provides that compensation and expenses of the trustee and his attorney should be paid as priority claim out of the bankruptcy estate, it does not provide that a bankruptcy court is empowered to render judgment for such compensation against the bankrupt or any other persons whom it feels equitably should bear such expense, and there is nothing in the Bankruptcy Act which confers power on the court to order the bankrupt to pay such items. *John Viviane & Sons, Inc.*, 105 F. S. 23; see also *Super vs. Viviane & Sons, Inc.*, 258 Fed. 2nd 826.

Attorneys may collect their fees from the bankrupt estate only as specifically provided by the Bankruptcy Act.

It is only where payment of attorneys fees to the attorney for the adverse party is provided for by contract or statute that they can be enforced. *In re: Joslynn,* 224 Fed. 2nd 223.

In *Stokes vs. Sidberry,* 275 F. 894, reversed 261 U. S. 571, 67 L. Ed. 802, we find such a case, which resulted from an adversary suit in State Court to set aside a fraudulent conveyance, in which the bankrupt was a defendant, the bankrupt agreed to pay the attorney fees and petitioned the bankruptcy court to set a reasonable fee, and the services having been made necessary by the bankrupt's failure to turn over the property the bankrupt estate was increased by the amount of the attorney fee.

The application of the rule in the case at 261 U. S. 571 can be applied only when the bankrupt acts to defraud his creditors, and compels the services to be necessary because of his failure to turn over his property to the trustee.

It is then that all of such property recovered from a third person by an adversary action is brought within the jurisdiction of the "Bankruptcy Court," and this under the statutory authority found in Sect. 70-e 2 which reads as follows:

> "All property of the debtor affected by any such transfer shall be and remain a part of his assets and estate * * *."

Congress has not enacted a law to accomplish what the referee has done in this matter, and it would require due process of law, and a case of controversy involving adverse parties.

The judicial power of the courts of the United States cannot be exercised without a "case" or "controversy" to which, under the Federal Constitution, the judicial power

alone extends. This requires due process of law and the existence of present or possible adverse parties. *Maskrat vs. United States*, 219 U. S. 346, 55 L. Ed. 246.

CONCLUSION.

It is respectfully requested that this Court issue its writ of certiorari to review the decision of the Court below.

Respectfully submitted,

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APPENDIX.

CONSTITUTIONAL PROVISIONS.

U. S. Constitution, Article I, Section VIII, Clause Four:

"The Congress shall have power * * *; To establish * * * uniform laws on the subject of bankruptcies throughout the United States.

U. S. Constitution, Art. III:

"The judicial power shall extend to all cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority. * * *"

U. S. Constitution, Amendment V:

"No person shall * * * be deprived of life, liberty or property, without due process of law, * * *

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed April 19, 1966.)

Before: WEICK, *Chief Judge*, PHILLIPS and EDWARDS, *Circuit Judges.*

IT IS HEREBY ORDERED AND DECREED that the order of the United States District Court for the Northern District of Ohio, dated March 5, 1965, approving a distribution order by the referee in bankruptcy in the above-styled cause be and it is hereby affirmed on the basis of the memorandum opinion filed by District Judge Ben C. Green, dated March 1, 1965; it being the opinion of this court that this record discloses no abuse of discretion in the

setting of the attorney's fee, no error in the computation of statutory fees and charges, and no deprivation of appellant's right to due process of law.

Entered by order of the Court.

CARL W. REUSS,
Clerk.